Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11–18 OF 2001
LOW HOP BING J
9 JULY 2002

Civil Procedure *— Appeal — Notice of — Extension of time for filing — Whether solicitor's error in interpreting provision of law good and sufficient ground to justify delay and to grant extension of time — Subordinate Courts Rules 1980 O 9 r 3*

On 20 September 2000, after a full trial in the magistrate's court, the learned magistrate gave judgment in favour of the respondent and adjourned the assessment of damages to a later date. The appellant's solicitor advised the appellant to appeal against the learned magistrate's judgment. As a notice of appeal was not filed within time, the appellant filed an application for an extension of time to file a notice of appeal. The said solicitor averred that she had made a genuine and inadvertent error as to the time limit fixed for the filing of a notice of appeal, in that the judgment could not be properly called a judgment until and unless it was perfected and that the time fixed for filing the notice of appeal was 14 days after the sealed copy of the judgment was delivered. She added that the client should not be prejudiced by a bona fide error on the part of the solicitor and that there were merits in the appeal. The learned magistrate dismissed with costs the appellant's application. This was an appeal against that decision. The sole question before the court in this appeal was whether a solicitor's error in interpreting O 9 r 3 of the Subordinate Courts Rules 1980, governing the time fixed for the filing of a notice of appeal, was a good and sufficient ground to justify the delay and to grant an extension of time to file the said notice of appeal.

Held, allowing the appellant's appeal for an extension of time to file the notice of appeal:

(1) There was manifestly a misinterpretation of O 9 r 3 of the Subordinate Courts Rules 1980 by the solicitor having conduct of the appellant's matter. The opening sentence of the provision is clear and unambiguous in that it is imperative and mandatory for the necessary notice of appeal to be filed within 14 days from the day on which the decision is pronounced. Nowhere is it stated that the time for filing the notice of appeal is to run from the day the judgment is perfected (see pp 137H–138A).

(2) An application for an extension of time relying on the mistake of a solicitor should not be dismissed outright but should be considered together with other factors. In the exercise of discretion for the grant of such extension of time, the court would normally consider: (i) the length of the delay; (ii) the reasons of the delay; (iii) the merits of the appeal; and (iv) the degree of

prejudice to the respondent. No undue prejudice would be occasioned to the respondent in the instant case as the learned magistrate's judgment of 20 September 2000 sought to be appealed against was only in respect of liability as the assessment of damages had yet to be determined. Even assuming that there was such a prejudice, the prejudice could be compensated by way of costs (see p 139B–G); *Soon Huat Construction Sdn Bhd v Kiong Siang Construction Sdn Bhd* [1999] 4 MLJ 130 and *Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 followed.

[**Bahasa Malaysia summary**

Pada 20 September 2000, selepas perbicaraan penuh di dalam mahkamah majistret, majistret yang arif telah memberi penghakiman kepada responden dan telah menangguh taksiran ganti rugi kepada tarikh yang lain. Peguam perayu telah menasihatkan perayu supaya merayu terhadap penghakiman majistret. Memandangkan notis rayuan tidak difailkan di dalam tempoh masa yang diperuntukkan, perayu telah memfailkan satu permohonan untuk lanjutan masa untuk memfailkan notis rayuan. Peguam perayu telah menyatakan bahawa beliau telah melakukan kesilapan yang tidak disengajakan mengenai had masa untuk memfailkan notis rayuan tersebut, iaitu sebarang penghakiman tidak boleh dikatakan satu penghakiman sehingga ia disempurnakan dan masa yang diperuntukkan untuk memfailkan notis rayuan adalah 14 hari setelah salinan termeterai penghakiman tersebut diberikan. Beliau berkata bahawa anak guam beliau tidak patut diprejudiskan oleh kesilapan peguam yang bona fide dan terdapat merit-merit di dalam rayuan tersebut. Majistret yang arif telah menolak permohonan perayu dengan kos. Ini merupakan rayuan terhadap keputusan tersebut. Satu-satunya persoalan di hadapan mahkamah dalam rayuan ini adalah sama ada kesilapan seorang peguam dalam mentafsirkan A 9 k 3 Kaedah-Kaedah Mahkamah Rendah 1980 berkenaan dengan masa yang diperuntukkan untuk memfailkan notis rayuan merupakan alasan yang baik dan mencukupi untuk menjustifikasikan kelewatan tersebut dan untuk membenarkan perlanjutan masa untuk memfailkan notis rayuan tersebut.

Diputuskan, membenarkan rayuan perayu untuk perlanjutan masa untuk memfailkan notis rayuan:

(1) Terdapat salahtafsiran yang jelas A 9 k 3 Kaedah-Kaedah Mahkamah Rendah 1980 oleh peguam yang melaksanakan hal perayu. Ayat pembukaan peruntukan tersebut adalah jelas di mana ia adalah sangat mustahak dan mandatori supaya notis rayuan tersebut difailkan dalam masa 14 hari daripada tarikh pemberian keputusan. Tidak dinyatakan bahawa masa untuk memfailkan notis rayuan tersebut bermula daripada tarikh penghakiman tersebut disempurnakan (lihat ms 137H–138A).

(2) Permohonan untuk perlanjutan masa yang bergantung kepada kesilapan seorang peguam tidak patut ditolak begitu sahaja tetapi hendaklah dipertimbangkan bersama faktor-faktor yang lain. Di dalam penggunaan budi bicara untuk membenarkan perlanjutan masa, mahkamah akan membuat pertimbangan mengenai: (i) tempoh kelewatan; (ii) alasan-alasan untuk kelewatan tersebut; (iii) merit-merit rayuan tersebut; dan (iv) tahap prejudis kepada responden. Responden tidak akan diprejudiskan di dalam kes ini memandangkan penghakiman majistret pada 20 September 2000 yang dirayukan hanya berkenaan dengan liabiliti kerana taksiran ganti rugi belum ditentukan. Walaupun terdapat prejudis sebegini, ia boleh diberikan pampasan melalui kos (lihat ms 139B–G); *Soon Huat Construction Sdn Bhd v Kiong Siang Construction Sdn Bhd* [1999] 4 MLJ 130 dan *Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 diikut.]

Notes

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1028–1094.

Cases referred to

Chong Kueng Ying & Ors Lovis Lavagna [1972] 1 MLJ 180 (refd)
Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 (folld)
Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (refd)
Soh Keng Hian v American International Co Ltd [1996] 1 MLJ 191 (refd)
Soon Huat Construction Sdn Bhd v Kiong Siang Construction Sdn Bhd [1999] 4 MLJ 130 (folld)
Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor [1984] 1 MLJ 118 (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Legislation referred to

Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) r 3A
Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) O 2 r 3
Subordinate Courts Act 1948 Sch 3, para 22
Subordinate Courts Rules 1980 O 3 r 5, O 9 r 3, O 49 r 1

Tan Boon Tui (*SF Pang & Chandra*) for the appellant/defendant.
Mohan (*Mohan & Assoc*) for the respondent/plaintiff.

Low Hop Bing J:

Appeal

This is an appeal against the decision of the learned magistrate of Melaka who had, on 6 April 2001, dismissed with costs the appellant's (defendant's) application in encl 17 for an extension of time to file a notice of appeal.

Facts of the case

The defendant's affidavit in support of his application in encl 17 was affirmed by one Fatima bte Tahir Ali, an advocate and solicitor having conduct of the defendant's matter herein.

On 20 September 2000, after a full trial in the Melaka Magistrate's Court, Summons No 72–493–1995, the learned magistrate gave judgment in favour of the plaintiff and adjourned the assessment of damages to 8 November 2000. The aforesaid learned advocate and solicitor advised the defendant to appeal against the learned magistrate's judgment but averred that she had made a genuine and inadvertent error as to the time limit fixed for the filing of the notice of appeal, in that the judgment cannot be properly called a judgment until and unless it is perfected, and that the time fixed for filing the notice of appeal is 14 days after the sealed copy of the judgment was delivered. She added that the client should not be prejudiced by a bona fide error on the part of the solicitor and that there are merits in the appeal.

Parties' contentions and decision on appeal

Mr Tan Boon Tui, learned counsel for the defendant, repeated the contention as affirmed in the aforesaid affidavit in support.

Mr Mohan, learned counsel for the plaintiff, submitted that the mistake and delay occasioned by the defendant's solicitor was not a good ground because ignorance of the law was no defence and that this application should be dismissed with costs.

The sole question before me is whether a solicitor's error in interpreting a provision of the law governing the time fixed for the filing of a notice of appeal is a good and sufficient ground to justify the delay and to grant an extension of time to file the said notice of appeal.

The opening sentence in O 9 r 3 of the Subordinate Courts Rules 1980 which regulates the filing of a notice of appeal from a subordinate court to the High Court reads as follows:

> The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced ...

The entire provision contained in this opening sentence is clear and unambiguous, and so full effect should be given to it in that it is imperative and mandatory for the necessary notice of appeal to be filed within 14 days from the day on which the decision (which under O 49 r 1 includes a judgment, order or decree) was pronounced. Nowhere was it stated that the

time for filing the notice of appeal was to run from the day the judgment was perfected. There was manifestly a misinterpretation, albeit bona fide, by the learned advocate having conduct of the defendant's matter. A

In so far as the subordinate courts are concerned, para 22 of the 3rd Sch to the Subordinate Courts Act 1948 and O 3 r 5 of the Subordinate Courts Rules 1980 confer concurrent powers on our subordinate courts to, eg, extend the time prescribed by any written law for doing any act or taking any proceedings, although any application therefor be not made until after the expiration of the time prescribed. These powers are to be exercised by way of discretion. It is a judicial discretion and, not being an unprincipled discretion, must be exercised in accordance with established judicial principles, having regard to all the facts and circumstances of each particular case. B C

The plaintiff's learned counsel relied on the Court of Appeal decision in *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191, where there was a delay on the part of the appellant to serve the notice of appeal out of time, although the same was filed within the time fixed for filing. The Court of Appeal held that there was no reasonable explanation for the failure to serve the notice of appeal and so felt unable to exercise the discretion in the appellant's favour. Nevertheless, the Court of Appeal added that it is axiomatic that there is a wide discretion to extend time in proper and deserving cases, on the basis of some relevant evidential material before the court. D E

A similar conclusion was arrived at by the Federal Court in *Chong Kueng Ying & Ors v Lovis Lavagna* [1972] 1 MLJ 180 which was also a case of delay in serving a copy of the notice of appeal on the respondent. The Federal Court held that the mistake by a legal adviser was not a sufficient ground for granting leave to serve the notice of appeal out of time. In *Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118, the Federal Court also held that the mistake of the appellant's solicitors on a point of law cannot constitute a sufficient ground for granting an extension of time to file a notice of appeal. F

As the power to extend time for doing an act or taking any proceeding is essentially an exercise of discretion, it is necessary to examine the governing established principles. In *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110, the Federal Court held that since leave to appeal had been obtained, there was, in all the circumstances, sufficient ground for granting the appellant's application to file the notice of appeal out of time. The Federal Court added that the court is now free to consider the mistake of a legal adviser on its merits in the same manner that the court would exercise its discretion in other cases, and that *Chong Kueng Ying & Ors* and *Tractors Malaysia Bhd* which excluded the court's discretion in cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980. This Federal Court decision in *Sinnathamby & Anor* was followed by Chong Siew Fai J (later CJ (Sabah and Sarawak)) in *Scott & English (M) Sdn Bhd v Leikie Refrigeration &* G H I

A *Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 in which his Lordship allowed the plaintiff's application for time to appeal against the stay of execution after a lapse of nearly one and a half years.

In *Soon Huat Construction Sdn Bhd v Kiong Siang Construction Sdn Bhd* [1999] 4 MLJ 130, Ian Chin J in a well considered judgment, analyzed, inter alia, the mistake of an advocate as a ground for the exercise of discretion whether or not to grant an extension of time. I am in entire agreement with the cogent reasoning of the learned judge and adopt his Lordship's conclusion that an application for an extension of time relying on the mistake of a solicitor should not be dismissed outright, but must be considered together with other factors such as the length of the delay and the likelihood of prejudice to the other party, and that those decisions which held that the mistake of a solicitor could not be a ground for the court to exercise its discretion to grant an extension of time were no longer good law.

From the plethora of authorities pertaining to the aforesaid question for determination by this court, and consequentially, in the exercise of discretion for the grant of extension of time to file a notice of appeal out of time, the court would normally consider:

(i) the length of the delay;

(ii) the reasons of the delay;

(iii) the merits of the appeal; and

(iv) the degree of prejudice to the respondent.

This was set out by Chong Siew Fai J (later CJ (Sabah and Sarawak) in *Scott & English (M) Sdn Bhd* who added at p 429 that:

> These factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the four factors must be in favour of an applicant in order that the discretion may be exercised to the applicant's benefit.

In the instant case, the learned magistrate's judgment sought to be appealed against is only in respect of liability delivered on 20 September 2000 as the assessment of damages had yet to be determined on that date, and so, in my view, no undue prejudice would be occasioned to the respondent. Even assuming for a moment that there is such prejudice, the prejudice can be compensated by way of costs. All these factors taken in juxtaposition with the aforesaid mistake of the appellant's solicitor would, in my view, be sufficient grounds for the exercise of the discretion to grant an extension of time to the appellant to file the notice of appeal in question.

As we move towards the era of facilitating the process of litigation, the raising of preliminary objections on technical grounds would certainly and clearly be a thing of the past. Quite recently, the Court of Appeal in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561, through the authoritative judgment of Ahmad Fairuz JCA (now Ag President of the Court of Appeal and CJ (Malaya)) expressly stated that a preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving. The Court of Appeal

had no hesitation in overruling the procedural technical objection. This principle is further manifested in the parallel and equipollent provisions in r 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O 2 r 3 of the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002), both of which came into force on 16 May 2002 in the following terms:

> Preliminary objection on the ground of non-compliance shall not be allowed.
>
> 3A A court or judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.
>
> Preliminary objection for non-compliance of rules not allowed (O 2 r 3)
>
> 3 A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

It is clearly the intention and wisdom of the Rules Committee to provide for the smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds, and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

On the foregoing grounds, I allow the appellant's appeal, set aside the magistrate's order refusing the extension of time and direct that the appellant's solicitors file the requisite notice of appeal at the registry of the Magistrate's Court in Melaka and serve on the respondent on or before 23 July 2002.

In the interest of justice, I order that the appellant do pay to the respondent RM500 costs for the day as this application was brought by the appellant on the basis of the mistake of the solicitor concerned.

Appellant's appeal for an extension of time to file the notice of appeal allowed.

Reported by Joel Ng